Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

October Term, 2009

BILLY TORAIN,
*Petitioner*,

v.

AT&T Management Services LP et al.,
*Respondent*.

**On Petition For a Writ of Certiorari To the United States Court of Appeals For the Seventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

Billy Torain
*pro se*, Petitioner
811 Violet Cir
Naperville, Illinois 60540
Home: (312) 450-9232
Work: (847) 362-8483
btorain@yahoo.com

## QUESTION(S) PRESENTED FOR REVIEW

1. Whether the judiciary's goal of legal consistency not correctness allows an appellate court, in the absence of supportive factual evidence, to affirm a lower court decision and thus abrogate the requirement of liberal construction due a *pro se* litigant's filings.

2. Whether the appellate court's affirmance of a lower court decision, in the absence of factual support rises, to the level of denying petitioner's Constitutionally protected rights to redress in court.

3. Whether 28 U.S.C. §1915 allows dismissal of petitioner's request to proceed in forma pauperis, without consideration of the application itself

## PARTIES TO THE PROCEEDINGS

The Petitioner here is Billy Torain

The Respondent(s) here are as follows:

Ameritech Advanced Data Services ("AADS"-- Party to prior action)
AT&T Management Services, LP
AT&T Operations, Inc.
AT&T Services, Inc.
AT&T Teleholdings, Inc. (Parent company of AADS)

TABLE OF CONTENTS Page-1

QUESTIONS PRESENTED ..... i

PARTIES ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... v

OPINIONS BELOW ..... 1

STATUTES INVOLVED ..... 1

STATEMENT OF THE CASE ..... 2

REASONS FOR GRANTING THE WRIT ..... 3

I. The District Court Decision contained no Evidence of Privity Between The Current and Past Defendants; The Seventh Circuit's Affirmance Cannot Stand on an Unsupported Record ..... 3

(A) Once a Court of Competent Jurisdiction Decides a Case; Rule of The Case Attaches As to The Parties *To That* Case and Res Judicata Can Be Invoked ..... 4

(B) In The Alternative Petitioner Was Allowed to Sue Multiple Tort Feasors in a Separate Action ..... 6

**TABLE OF CONTENTS** **Page-2**

(C) The Appellate Court Is Required To Affirm Lower Court Decisions That Have Support Anywhere In Current Record For The Trial Court's Decision ..... 5

(D) Petitioner's pleadings were to be given liberal construction ..... 7

CONCLUSION ..... 7

APPENDIX

DISTRICT COURT JUDGMENT .....A1

DISTRICT COURT MINUTE ORDER ..... A2 – A5

SEVENTH CIRCUIT DECISION ..... A6 – A8

DENIAL OF PETITION FOR REHEARING .....A9 – A10

## TABLE OF AUTHORITIES Page-1

*Anchor Glass Container Corp. v. Buschmeier*,
426 F.3d 872 (7th Cir. 2005) ..... 5

*Bright v. Hill's Pet Nutrition, Inc.*,
510 F.3d 766 (7th Cir. 2007) ..... 3, 4

*Commissioner of Internal Revenue Service v. Bosch's Estate* 463 U.S. 110, 103 S.Ct. 2906..... 3

*Conley v. Gibson*,
355 U.S. 41 (1957)..... 7

*E.E.O.C. v. Harris Chernin, Inc.*,
10 F.3d 1286 (7th Cir. 1993) ..... 5

*EEOC v. Jefferson Dental Clinics, PA*,
478 F.3d 690 (5th Cir 2007) ..... 5

*Garcia v. Village of Mt. Prospect*,
360 F.3d 630, 635 (7th Cir.2004).....33

*Kremer v. Chemical Const. Corp.*,
456 U.S. 461, 102 S.Ct. 1883 (1982).....3

*Manicki v. Zeilman*, 443 F.3d 922 (7th Cir. 2006).....6

*Matter of L & S Industries, Inc.*,
989 F.2d 929 (7th Cir. 1993).....5

*Muhammad v. Oliver*,
*547 F.3d 874* (7th Cir. 2008).....3, 5

## TABLE OF AUTHORITIES Page-2

*Richards v. Jefferson County*, (1996)
517 U.S. 793, 797, 116 S.Ct. 1761, 1765.....5

*River Park, Inc. v. City of Highland Park*, (1998)
184 Ill.2d 290, 703 N.E.2d 883
234 Ill.Dec. 783, 789.....3

*Secretary of Labor v. Fitzsimmons*,
805 F.2d 682 (7th Cir. 1986).....5

*Southwest Airlines Co. v. Texas Intern. Airlines*,
546 F.2d 84 (5th Cir. 1977).....5

*Tartt v. Northwest Community. Hosp.*,
453 F.3d 817 (7th Cir. 2006).....5

*Torain v. AT&T Management Services, LP.*,
2009 WL 4023546 (C.A.7(Ill.)).....1

*United States v. Bestfoods*, 524 U.S. 51(1998).....3, 4

*Valtierra v. BNSF Railroad Co.*,
2002 WL 31844983 (N.D.Ill.).....5

### FEDERAL STATUTES & RULES

28 U.S.C. §1254.....1

28 U.S.C. §1915.....1, 2, 7

42 U.S.C. § 2000e.....2

## FEDERAL STATUTES & RULES CONT.

42 U.S.C. § 1981 as amended by the
Civil Rights Act of 1991.....2

## PETITION FOR WRIT OF CERTIORARI

Petitioner, Billy Torain as *pro se*, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case and that the judgment of the Seventh Circuit be reversed.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit affirming the decision of the United States District Court for the Northern District of Illinois, (the "District Court") which is unreported, is available at *Torain v. AT&T Management Services LP et al.*, Slip Copy 2009 WL4023546 (7th Cir., Nov. 23, 2009) and reprinted in the Appendix at A6-A8. The District Court judgment and order issued August 31, 2009 dismissing Petitioner's claims is unreported and reprinted in the Appendix at A1-A5. Finally, Petitioner's motion for reconsideration was denied by the Seventh Circuit on December 22, 2009 and is reprinted in the Appendix at A9-A10.

## JURISDICTION

The United States Court of Appeals for the Seventh Circuit denied Petitioner's timely motion for rehearing (en banc) on December 22, 2009. Petitioner's application for extension of time to file petition was granted by Justice Stevens on March 22, 2010. The petition was timely filed on May 21, 2010 pursuant to Supreme Court Rule 22. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

## STATUTE(S) INVOLVED

28 U.S.C. § 1915 Proceedings in forma pauperis

## STATEMENT OF THE CASE

Petitioner worked for Ameritech Advanced Data Services, Inc. ("AADS") beginning June 2004 and was terminated in June 2005. Petitioner filed a complaint of employment discrimination, against SBC, Inc. in August 2006 ("Torain I") pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C.§2000e *et seq.*, and the 42 U.S.C. §1981 as amended by the Civil Rights Act of 1991[1]. The case was dismissed and affirmed on appeal pursuant to 28 U.S.C. §1915(e)(2)(A).

On June 17, 2009 petitioner, filed a complaint of employment discrimination pursuant to 42 U.S.C. §1981 ("Torain II") as amended by the Civil Rights Act of 1991 for his 2005 termination against different defendants.[2] All defendants are separate and distinct subsidiary companies under AT&T, Inc. A trial court order issued June 19, 2009, asked Petitioner about the relationship of the named defendants to AADS, his former employer to which he advised that none of these companies were predecessor, successor or assigns to AADS. The trial court dismissed Petitioner's claims without prejudice on August 6,

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[1] Subsidiary AADS answered the complaint stating it was wrongly named as SBC Inc., who neither answered nor appeared.

[2] The defendants AT&T; Management Services, LP, ("AT&T MS"); Operations, Inc. ("AT&T OPS"); Services, Inc. ("AT&T SI") and Teleholdings ("AT&T TH"—Petitioner sought to remove this defendant as it was found to be the parent of AADS) were never served summons and never appeared in Torain II.

2009 and after a Federal Rule of Civil Procedure ("FRCP") Rule 60(b) motion for relief, petitioner was denied IFP Status and his claims dismissed based on *res judicata* grounds.

The Seventh Circuit affirmed the trial court, stating that Petitioner could not prevail "whether or not" the current defendants were in privity with AADS citing *United States v. Bestfoods*, 524 U.S. 51(1998) and *Bright v. Hill's Pet Nutrition, Inc.*, 510 F.3d 766 (7th Cir. 2007). This timely petition followed.

## REASONS FOR GRANTING THE PETITION

### I. The District Court Decision contained no Evidence of Privity Between The Current and Past Defendants; The Seventh Circuit's Affirmance Cannot Stand on an Unsupported Record.

The instant petition for writ of certiorari presents two simple questions: Can the Seventh Circuit, under the guise of legal consistency, ignore clearly defined precedent for establishing res judicata generally requiring a final judgment on the merits, same party or privies and the same cause of action. *Garcia v. Village of Mt. Prospect*, 360 F.3d 630, 635 (7th Cir.2004); *Muhammad v. Oliver*, 574 F.3d 874 (7th Cir.2008); *River Park, Inc. v. City of Highland Park*, (1998)184 Ill.2d 290, 302 703 N.E.2d 883, 889 234 Ill.Dec. 783, 789; *Commissioner of Internal Revenue v. Bosch's Estate*, 463 U.S. 110, 103 S.Ct. 2906; *Kremmer v. Chemical Construction Corp.*, 456 U.S. 461, 467 102 S.Ct. 1883, 1890. Nowhere in the record is it explained how legal privity was determined to exist between any of the defendants.

This is reflected in the Seventh Circuit's opinion erroneously citing *United States v. Bestfoods*, 524 U.S. 51 (1998) and *Bright v. Hill's Pet Nutrition, Inc.*, 510 F.3d 766 (7th Cir.2007) as controlling. Neither of these cases can be used in affirmance of the district court's decision dismissing Petitioner's claims, *sua sponte*, based on a privity argument, when neither case involved a privity determination.

This indefensible opinion handed down by the Seventh Circuit will, if left uncorrected, results in Petitioner being denied his basic Constitutional right to redress in court. If the Seventh Circuit decision is allowed to stand it represents bad law and that the federal courts can make arbitrary determinations disconnected from the elements and parties of the case and even from the decision of the lower court. The Seventh Circuit's affirmance arbitrarily denies Petitioner his day in court, the far-reaching consequences of which need not be overstated. For these reasons, Petitioner prays the Court issue a writ of certiorari, vacate the judgment of the Seventh Circuit and remand for further proceedings

### A. Once a Court of Competent Jurisdiction Decides a Case; Rule of The Case Attaches As to The Parties To That Case and Res Judicata Can Be Invoked

The Judicial Code directs Federal courts to give "full faith and credit" to prior state judicial decisions. 28 U.S.C. § 1738; *Kremer* at 467, 102 S.Ct. 1890 "For the purpose of determining whether res judicata applies to bar subsequent action, where the earlier action is brought in Federal court, the federal

rules of res judicata apply." *Valtierra v. BNSF Railroad Co.*, 2002 WL 31844983 *4 (N.D.Ill.) citing *E.E.O.C. v. Harris Chernin, Inc.*, 10 F.3d 1286 , 189-90 n.4 (7th Cir. 1993)

In determination of federal res judicata, the same standard of determination is in effect between state and federal courts on the merits involving 1) a final judgment on the merits in an earlier action, (2) an identity of the cause of action in both the earlier and later suit, and (3) an identity of parties or privies in the two suits. See *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682 (7th Cir. 1986) *EEOC v. Jefferson Dental Clinics, PA*, 478 F.3d 690 (5th Cir 2007) Claim preclusion standards apply equally to corporations that engage in litigation decided on the merits and later resurrect the same or similar claims based on new legal theories with previously named defendants. See *Muhammad v. Oliver, 547 F.3d 874* (7th Cir. 2008);*Tartt v. Northwest Community. Hosp.*, 453 F.3d 817 (7th Cir. 2006); *Anchor Glass Container Corp. v. Buschmeier*, 426 F.3d 872 (7th Cir. 2005); *Southwest Airlines Co. v. Texas Intern. Airlines*, 546 F.2d 84 (5th Cir. 1977); *Matter of L & S Industries, Inc.*, 989 F.2d 929 (7th Cir. 1993)

This Court states that "The opportunity to be heard is an essential requisite of due process of law in judicial proceedings...so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein." *Richards v. Jefferson County*, (1996) 517 U.S. 793, 797, 116 S.Ct. 1761, 1765. In the present

action this is exactly what the Seventh Circuit has done.

### B. In The Alternative Petitioner Was Allowed to Sue Multiple Tort Feasors in a Separate Action.

In Torain I, Petitioner brought his original suit against the SBC, Inc. the entity he believed he worked for only to find out that AADS was his employer. During discovery Petitioner was made aware that the current defendants took direct action against him and can subsequently be held liable for their direct actions. "Even if a plaintiff's right to relief arises from what is realistically viewed as a single episode, if it is a right against multiple parties—joint tortfeasors, if the right arises under tort law—he needn't join them in one suit." *Manicki v. Zeilman*, 443 F.3d 922 (7th Cir. 2006)

### C. The Appellate Court Is Required To Affirm Lower Court Decisions That Have Support Anywhere In Current Record For The Trial Court's Decision.

Petitioner, completed an IFP application in the current action. His submission identified a -$1,597.19 expense deficit each month due in large part to Petitioner being in foreclosure since 2006[3]. There was no factual evidence to glean from the trial court's IFP denial and no discussion by the Seventh Circuit addressing how Torain was able to pay for court fees with his identified negative cash flow each

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[3] Petitioner eventually lost his home through confirmed Judicial Foreclosure Sale on January 5, 2010.

month. This is not the fair and impartial opportunity expected in a system where consistency of law should require that Petitioner be given the consideration of 28 U.S.C. § 1915 versus an obscure denial stating Petitioner makes enough money.

### D. Petitioner's pleadings were to be given liberal construction.

Petitioner doesn't claim ignorance of the law, but even as indicated by this filing he is not a lawyer. At the district court Petitioner's pleadings should have been construed liberally and he should be given the opportunity to present his claims as this court stated, "We cannot say with assurance that under the allegations of the pro se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). Citing *Dioguardi v. Durning*, 139 F.2d 774 (CA2 1944). In the circumstance where there is a chance for Petitioner to prove his claims he should be afforded the opportunity to do just that.

## CONCLUSION

This petition presents no circuit conflict; it presents no new questions of law. Rather it represents a circumstance were the Seventh Circuit ignored the absence of factual evidence supportive of the trial court and affirmed a decision that was not only contrary to law, was not governed by the cited

precedent, but more significantly denied Petitioner his constitutional right to due process and equal protection of the law. Petitioner, as *pro se*, seeks only to ensure that unsupported arbitrary decisions by the trial court do not further create bad law, or a pattern of decisions that carelessly deny persons in vulnerable position such as *pro se* litigants.' Petitioner prays that this Court issue a writ of certiorari, vacate the judgment of the United States Court of Appeals for the Seventh Circuit and remand this issue for further proceedings.

July 27, 2010

Respectfully Submitted,

Billy Torain

Billy Torain
pro se *Petitioner*
811 Violet Cir
Naperville, Illinois 60540
Home: (312) 450-9232
Work: (847) 362-8483
Email: btorain@yahoo.com

AO 450(Rev. 5/85)Judgment in a Civil Case

# United States District Court

## Northern District of Illinois

### Eastern Division

Billy Torain

v.

AT&T Management Services, LP, et al

**JUDGMENT IN A CIVIL CASE**

Case Number: 09 C 3660

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff's motion to vacate the dismissal order is denied. This order is final and appealable.

Case 1:09-cv-03660 Document 11 Filed 08/27/09

**United States District Court, Northern District of Illinois**

| Name of Assigned Judge or Magistrate Judge | Rebecca R. Pallmeyer | Sitting Judge if Other than Assigned Judge | |
|---|---|---|---|
| CASE NUMBER | 09 C 3660 | DATE | 8/27/2009 |
| CASE TITLE | Billy Torain vs. AT&T Management Services, LP, et al | | |

DOCKET ENTRY TEXT

Motion hearing held. The motion for leave to file a memorandum or law [7-2] is granted; the motion to vacate the dismissal order [7-1] is denied. This order is final and appealable. The court notes, finally, that Mr. Torain's financial affidavit demonstrates he capable of paying the court's filing fee. His motion for leave to proceed *in forma pauperis* [4] is therefore denied. This order is final and appealable. (For further details see minute order.)

■

Notices mailed by Judicial staff. *Mail AO 450 form.

*Or further details see text below

00:05

**STATEMENT**

On June 17, 2009, Plaintiff Billy Torain submitted a *pro se* complaint of employment discrimination against several A T & T entities, together with an application for leave to proceed *in forma pauperis*. This court reviewed Mr. Torain's complaint, which challenged his termination in June 2005 and, in a minute order dated June 19, 2009, directed Mr. Torain to explain the relationship, if any, between the Defendants named here and Ameritech Advanced Data Services ("AADS"), an organization that Mr. Torain alleged he had sued in an earlier lawsuit related to his employment. The court also directed Mr. Torain to show cause why his complaint, filed four years after termination of his employment, should not be dismissed as untimely.

The court did not receive any response to the June 19, 2009 order. Accordingly, on August 6, the case was dismissed.

Mr. Torain now moves to vacate the dismissal order. Attached to his motion is a copy of a letter to the court dated July 7, 2009, and documents reflecting its delivery by the Postal Service. The court did not in fact receive the letter in July 2009, however, nor is there any record of its receipt by the Clerk.

Having reviewed Mr. Torain's letter, the court is satisfied that his complaint facially survives a timeliness challenge. Having reviewed his proposed Amended Complaint, however, the court concludes that the motion to vacate the dismissal order must nevertheless be denied, as this case is an attempt to relitigate a previously- dismissed action. Specifically, Mr. Torain filed a lawsuit in 2006 in which he challenged acts of discrimination and retaliation in connection with his employment. He identified his employer in that earlier lawsuit as SBC, not AADS. Although Mr. Torain alleges that the earlier lawsuit is "currently on appeal," it was in fact dismissed by Judge Gottschall due to Mr. Torain's failure to provide truthful information in his financial affidavit. See Docket for 06 C 4559. That dismissal was affirmed and, on April 30, 2009, the Seventh Circuit denied Mr. Torain's petition for a rehearing. If any appeal is pending, it is to the United

**STATEMENT**

States Supreme Court.

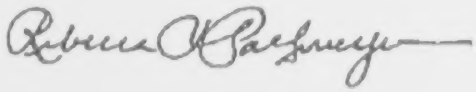
Having reviewed the file in that earlier lawsuit, the court concludes that Mr. Torain's earlier case challenged the same employment decisions that are the subject of this lawsuit. Although he identified his employer in that earlier case as SBC, he alleged in that earlier case that he was employed by the defendant from October 1999 through June 17, 2005 – precisely the same dates alleged in his Amended Complaint in this case. (Amended Complaint ¶ 4.) As in this case, he alleged there disputes with his employer regarding his involvement with a business known as Melaleuca; about his use of his company-issued cell phone; and about conversations in the workplace regarding religion. In both lawsuits, Mr. Torain claims his employer discriminated against him by paying him less than his predecessor, Mr. Michelotti. Indeed, Mr. Torain's allegations in this lawsuit make clear that he intends to rely on evidence generated by discovery in that previous lawsuit. And he acknowledges in a footnote to his July 7 letter that A T &T and SBC are "interchangeable." T

The doctrine of *res judicata* bars relitigation of any case where there has been (1) a final adjudication on the merits in an earlier action; (2) identity of the cause of action between the earlier and later suit; and (3) an identity of the parties or privies in the two suits. *Tartt v. Northwest Cmty. Hosp.*, 453 F.3d 817, 822 (7th Cir. 2006) (citing *Smith v. City of Chicago*, 820 F.2d 916, 917 (7th Cir. 1987)). If Mr. Torain prevails in his appeal to the United States Supreme Court, he will be entitled to litigate his claims in the earlier lawsuit. If he does not prevail, that earlier decision bars this one under the doctrine of *res judicata*. In either case, this lawsuit must be dismissed.

The court notes, finally, that Mr. Torain's financial affidavit

demonstrates he is capable of paying the court's filing fee. His motion for leave to proceed *in forma pauperis* [4] is therefore denied.

The motion for leave to file a memorandum or law [7-2] is granted; the motion to vacate the dismissal order [7-1] is denied. This order is final and appealable.



NONPRCENDENTIAL DISPOSITION
To be cited only in accordance with
Fed. R. App. P. 32.1

# United States Court of Appeals

For The Seventh Circuit
Chicago, Illinois 60604

Submitted November 19, 2009*
Decided November 23, 2009

Before

FRANK H. EASTERBROOK, *Chief Judge*

DIANE P. WOOD, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

No. 09-3235

BILLY TORAIN,
*Plaintiff-Appellant,*
v.

AT&T MANAGEMENT SERVICES, LP, et al.,
*Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 09 C 3660c

Rebecca R. Pallmeyer, *Judge.*

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* This successive appeal has been submitted to the original panel under Operating Procedure 6(b). After examining the briefs and the record, we have concluded that oral argument is unnecessary. See Fed. R. App. P. 34(a); Cir. R. 34(f).

**Order**

Billy Torain was fired in June 2005. The district court dismissed the suit against his ex-employer, and we affirmed, having first made it clear that the dismissal was with prejudice. *Torain v. Ameritech Advanced Data Services of Illinois, Inc.*, No. 08-3346 (7th Cir. Apr. 1, 2009) (nonprecedential disposition).

Torain then filed a new suit, seeking damages for the same assertedly wrongful discharge. The district court dismissed the second suit as barred by *res judicata* (claim preclusion) and added that Torain could not at all events proceed *in forma pauperis*, as he has sufficient assets to pay the filing fee. (Torain's attempt to conceal these assets from the district court was the reason the judge dismissed his first suit. That he should again propose to proceed *in forma pauperis* is unfathomable.)

The appeal contends that claim preclusion is inapplicable, because the defendants in the second suit differ from the defendant in the first, and the different parties should not be deemed in privity. But if the current defendants are not Torain's former employer (or in privity with it), how could they be liable for his dismissal? Torain seems to believe that all businesses associated within a holding company structure (the ex-employer, and the current defendants, all are subsidiaries of AT&T) are liable for each other's wrongs. That would be possible only if they were treated as a single employer, as they could be if the requirements for "piercing the corporate veil" were met. See e.g., *United States v. Bestfoods*, 524 U.S. 51 (1998). But if that were so, the privity requirement also would be satisfied. And if the requirements for "piercing" are not met, then it is impossible to understand how one business could be held liable for another's wrongful discharge. See, e.g., *Bright v. Hill's Pet Nutrition, Inc.*, 510 F.3d 766 (7th Cir. 2007). So Torain cannot prevail, whether or

not the defendants in the current suit are in privity with the defendant in the first suit.

AFFIRMED.

NONPRCENDENTIAL DISPOSITION
To be cited only in accordance with
Fed. R. App. P. 32.1

# United States Court of Appeals

For The Seventh Circuit
Chicago, Illinois 60604

Submitted November 19, 2009
Decided November 23, 2009

Before

FRANK H. EASTERBROOK, *Chief Judge*

DIANE P. WOOD, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

No. 09-3235

BILLY TORAIN,
*Plaintiff-Appellant,*
v.
AT&T MANAGEMENT SERVICES, LP, et al.,
*Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 09 C 3660
Rebecca R. Pallmeyer, *Judge.*

## Order

Plaintiff-appellant filed a petition for rehearing and rehearing en banc on December 7, 2009. No judge in regular active service has requested a vote on the petition for

rehearing en banc,* and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

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* Circuit Judge Williams did not participate in the consideration of this petition.

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